the house. In her attempt to save the contradiction, the Second Accused committed yet another contradiction by alleging that Ah Mei did not want to collect the uniforms because there was no urgency. If there was no urgency, then it is inconceivable why the Accused should rush to complete the whole work within four days. On the evidence, I find Ah Mei did not in fact take any role either in respect of the uniforms or the handgrenades.

Having considered the case as a whole, I find the Defence of both the Accused have not raised any reasonable doubt in the Prosecution case. I am satisfied beyond reasonable doubt that the 9 primed grenades were found under the exclusive control of both the Accused without lawful excuse and authority, and that they knew of their existence at the material time. In the circumstances, I find both Accused guilty and convict them of the charge. The mandatory death sentence is accordingly passed.

Convicted and sentenced accordingly.

Solicitors: *Karpal Singh & Co.; Ngeow & Co.; Augustin Negrin & Co.*

ABU SEMAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Chong Siew Fai J.) August 21, 1981]
[Sibu – Criminal Appeal No. 1 of 1981]

Election – Bribery – Inducing electors to vote – Appeal against conviction and sentence – Fine enhanced – Election Offences Act 1954, ss. 10(a) & 11(1).

The appellant was charged on 3 counts of giving cash $5 to each of the 3 electors on September 19, 1979 in order to induce them to vote and thereby committed offences under section 10(a) of the Election Offences Act 1954, punishable under section 11(1) thereunder. The learned magistrate convicted him of all the charges and sentenced him to 5 days' imprisonment and $100 fine in default 2 weeks' imprisonment under each offence. The imprisonment sentences were to run consecutively. The appellant appealed.

Held: (1) The offence of corrupt practice may, in law, be committed irrespective of whether the person, who is otherwise liable, is or is not an agent for any political party or election candidate;

(2) what is material therefore is the intention of the giver of the money, not that of the elector who was given the money;

(3) it is unnecessary to prove inducement to vote for a certain political party. It is sufficient if it is proved that money was given in order to induce the elector to vote;

(4) in determining whether there had been bribery the court will always look to the essence of the transaction whether the act was done with a view to influencing a voter in relation to his vote. The intention of a person against whom a charge of bribery is made must be proved and this may be established from his acts and other circumstances of the case;

(5) the appellant had not shown how the learned trial magistrate failed to give any or any proper or adequate consideration to the defence of the case or how the verdict was unreasonable or unsatisfactory or cannot be supported as alleged;

(6) the appeal against conviction was dismissed. The sentences were varied: the imprisonment sentences were to be made concurrent and the fine under each offence was increased from $100 to $250. In default of payment of the sum of $150 being the increased amount under each offence, the appellant was to be imprisoned for 2 weeks.

Cases referred to:

(1) *Balasingam* v. *Public Prosecutor* [1959] M.L.J. 193.
(2) *The Westminister Case* 1 O' M. & H. 89.
(3) *Kingston-Upon-Hull* 6 O'M. & H. 372, 389.
(4) *Blackburn Case* 1 O'M. & H. 198, 202.
(5) *Darus* v. *Public Prosecutor* [1964] M.L.J. 322.
(6) *Jayanathan* v. *Public Prosecutor* [1973] 2 M.L.J. 68
(7) *R.* v. *King* [1970] 2 All E.R. 249.
(8) *R.* v. *Saleem* (1964) Crim. L.R. 482.
(9) *R.* v. *Walsh* (1965) Crim. L.R. 248.
(10) *R.* v. *Hockey* (1980) Crim. L.R. 594.

CRIMINAL APPEAL.

Teo Chong Lee for the appellant.

Nik Hashim bin Nik Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J.: The appellant was charged on 3 counts of giving cash $5.00 to each of the 3 electors namely Ganai anak Brayun (P.W.2), Ali anak Nari (P.W.3) and Luan anak Nari (P.W.4) on September 19, 1979 at about 12 noon at Rumah Nari, Sungei Gamuan, Binatang, Sarawak, in order to induce them to vote and thereby committed offences under section 10(a) of the Election Offences Act 1954, punishable under section 11(1) thereunder. The appellant claimed trial but was convicted upon all the charges and sentenced to 5 days' imprisonment and $100.00 fine in default 2 weeks' imprisonment under each offence; the imprisonment sentences were to run consecutively. Against the convictions and sentences the appellant now appeals.

The facts of the case are brief and may be summarised as follows:–

In September 1979 a State Assembly election

was held in Sarawak. P.W.2, P.W.3 and P.W.4 were registered voters from Rumah Nari, Sungei Gamuan, Binatang, which fell within the Constituency of Maradong (Constituency N.26), and they were to cast their votes on September 19, 1979 between 2.00 p.m. and 4.00 p.m. There were 5 candidates contesting in this constituency namely: Anthony Teo, Teo Sian Hai, Tan Ming Choo, Mark Sai Sai and Robinson Nagal. Immediately prior to the 1979 election, Anthony Teo was the State Assemblyman representing this constituency.

P.W.2 Ganai anak Brayun stated in his evidence that on September 19, 1979 at about noon in Rumah Nari the appellant gave him, Ali (P.W.3) and Luan (P.W.4) money. He said he saw the appellant giving money to Ali and Luan. The appellant personally gave him $5.00 in $1.00 denomination telling him "not to forget the old one". By the phrase "the old one", P.W.2 understood it to mean the usual political party. P.W.2 said later that afternoon residents of Rumah Nari were to cast their votes. He also said the appellant was a stranger to him when he (appellant) gave him the money. Before September 19, 1979, P.W.2 never saw the appellant giving away money in Rumah Nari. P.W.2 also said that after the money was passed, P.W.5 Mudai anak Sasuan got hold of him, P.W.3 and P.W.4 and took them to the police station where P.W.2 handed over the money to the police. P.W.2 said he cast his vote after receiving the money and the arrest. Under cross-examination, P.W.2 was positive that it was the accused/appellant who gave him the money.

The evidence of P.W.3 Ali anak Nari and P.W.4 Luan anak Nari were materially the same. Both of them said the appellant gave them $5.00 each, all in $1.00 denomination, telling each of them on each occasion of giving the money, not to forget the old one. Both of them said they did not understand what the appellant meant by the phrase "not to forget the old one". They both said they did not know the appellant and that they never saw the appellant giving away money in the longhouse prior to September 19, 1979. Later they were arrested by Mudai (P.W.5) and taken to the Binatang Police Station. They both cast their votes that afternoon. P.W.4 also said there was no wedding celebration on September 19, 1979.

P.W.5 Mudai anak Sasuan who worked for a candidate one Teo Sian Hai in the election said that there was polling for voters in Rumah Nari on September 19, 1979 afternoon. He went there at about 12 noon for the purpose of campaigning. Whilst passing Bilik Jugah he saw P.W.2, P.W.3 and P.W.4 coming out of the bilik, each holding $5.00 in their respective hands. Upon being inquired as to who gave them the money and the purpose therefor, they told P.W.5 that one "Lagian" gave them the money and that "Lagian" told them "not to forget the old one". Thereupon P.W.5 brought them to the Binatang Police Station. P.W.5 said he did not know who "Lagian" was and he did not see any wedding function at Rumah Nari on September 19, 1979. He also said it was not the tradition in Iban custom for people to distribute money in the longhouse. He lodged the police report (Exh. P3) in the evening of September 19, 1979 because when he arrived at the police station at about 1.00 p.m the officer-in-charge of criminal investigations was not available. Upon being cross-examined by the appellant, P.W.5 denied that it was he (P.W.5) who gave the money to P.W.2, P.W.3 and P.W.4. P.W.5 also said that when he saw P.W.2, P.W.3 and P.W.4 at Bilik Jugah, he also saw the appellant inside Bilik Jugah. He said the appellant was wearing a B.N. badge. All the 15 $1.00 notes were seized by the investigation officer Inspector Jason Chua (P.W.7).

In his defence the appellant admitted that he gave money to P.W.2, P.W.3 and P.W.4 whom he was not familiar and who asked from him money to drink tea. He said he gave them the money in the bilik of Ah Bai and that at the time of giving them money he did not know they were going to vote. He said it was his usual practice to give away money even to strangers in the bilik of Ah Bai and that he did not know that September 19, 1979 was a polling day. He also said that he did not go to Rumah Nari for the purpose of campaigning. He denied that he was the polling agent for Anthony Teo though he had been asked to be one. He also denied that he had bribed P.W.2, P.W.3 and P.W.4. According to him, he went to Rumah Nari by motor-cycle on September 19, 1979 at about 8.00 a.m. and left at about 11.00 a.m. He went there on account of the matter of the son of one Ah Bai (also known as Tiong Yu Kuong (D.W.2)) that was to take place the following week. The evidence of the appellant is not clear as to what exactly the matter was, but it was either the wedding or the engagement of Ah Bai's son. The appellant said he went there to explain that he was not able to be present the following week. He also said he went there also to discuss about acquisition of land for building mosque. He said whilst there he gave the women, men and children "Ang Pau" upon their requests.

Save for certain discrepancies, the evidence of D.W.2 Tiong Yu Kuong was substantially the same as that of the appellant. He said that the appellant went to his longhouse on September 19, 1979 at about 8.00 a.m. saying that he (appellant) was unable to attend the wedding of P.W.2's son. As usual, he gave money to people. He left about 11.00 a.m. He said the appellant came by taxi. He agreed that "late that day" it was polling time for residents of his longhouse. Contrary to what the appellant said, however, he said the appellant did not say about supporting the Government or Chief Minister.

The judgment of the learned trial Magistrate clearly showed that she had carefully considered the evidence of both the prosecution and the defence and observed the demeanour of the witnesses in court. She accepted P.W.2, P.W.3, P.W.4 and P.W.5 as reliable witnesses of truth. She found as a fact that it was the appellant who gave P.W.2, P.W.3 and P.W.4 the money. She also concluded that the intention of the appellant giving them the money was to induce them "to vote for a certain political party". She found that the prosecution had proved the charges beyond reasonable doubt and that the defence had not cast a shred of doubt on the prosecution case. She accordingly convicted and sentenced the appellant.

Several grounds of appeal were advanced on behalf of the appellant and I shall now deal with them.

Ground 2 was abandoned and I need say nothing about it.

Ground 3 reads:—

"The learned Magistrate erred in law in admitting and considering the evidence of P.W.5 who was the election agent for Teo Sian Hai, an independent candidate at the material time, and whose evidence was biased and unreliable (Judgment page 7, 1st paragraph)."

Contrary to what was alleged in this ground about bias and unreliability of P.W.5's evidence, the learned trial Magistrate who was well aware that he (P.W.5) was the election agent of Teo Sian Hai and who had observed his demeanour in court, found him to be a reliable witness. P.W.5's evidence e.g. that he saw P.W.2, P.W.3 and P.W.4 holding money in their hands, that they told him that "Lagian" gave them the money and told them 'not to forget the old one' was materially substantiated by the evidence of P.W.2, P.W.3 and P.W.4. The appellant himself admitted that he gave money to them. I see no reason for interfering with the finding of the learned trial Magistrate. As to the contention that the learned trial Magistrate erred in law in admitting and considering the evidence of P.W.5, it has, in my view, no foundation. Even an interested witness is entitled to have his evidence admitted and considered provided it is admissible under the law of evidence. As stated by Ismail Khan J. (as he then was) in *Balasingam* v. *Public Prosecutor*[1]

"After all there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances."

Counsel for the appellant contended that the finding of the learned trial Magistrate that P.W.5 was "one who is not easily intimidated" was contradictory to the evidence of P.W.5 himself when he said: "I didn't take any action for fear of trouble". With respect, I do not think that the argument without condescending upon the particular circumstances under which P.W.5 chose to take no action is fair and reasonable. When P.W.5 said: "I didn't take any action for fear of trouble" in answer to question by the court, it was in reference to the fact that the appellant gave money to P.W.2, P.W.3 and P.W.4 and the latter told P.W.5 that "Lagian" gave them the money without saying who "Lagian" was. According to P.W.5, at that stage, he was merely suspecting that "Lagian" was the accused. There were many people in the longhouse and polling was to begin within a couple of hours. In that situation inaction on the part of P.W.5, who was merely an election agent for another candidate, was, in my view, understandable. To my mind, that fact alone, cannot be said to be so weighty as will upset the finding of the learned trial Magistrate that P.W.5 impressed her as one who was not easily intimidated.

I hold that this ground fails.

Ground 4 of appeal reads:—

"The learned Magistrate erred in law in holding that a person may commit an offence of bribery without becoming an agent for any political party or election candidate (Judgment page 9, 1st paragraph)."

Section 10(a) of the Election Offences Act 1954 in so far as material to the instant case provides that every person who directly by *himself* gives any money to any elector or voter in order to induce any elector or voter to vote shall be

deemed guilty of the offence of bribery; and section 11(1)(b) of the said Act provides *inter alia* that every person who commits the offence of bribery shall be guilty of a corrupt practice. In both subsections referred to above the words "every person" were used. It is obvious that the offence of corrupt practice may, in law, be committed irrespective of whether the person, who is otherwise liable, is or is not an agent for any political party or election candidate. This ground has no merit.

I shall now take Grounds 1 and 5.

Ground 1 reads:–

"The learned Magistrate erred in law when she failed to find out from P.W.1 who was Anthony Teo's election or polling agent (Judgment page 3, 1st paragraph)."

Ground 5 states:–

"The learned Magistrate erred in law in holding that it is immaterial that the person to whom the money was given failed to understand the message that the giver tried to get across (Judgment page 9, 1st paragraph)."

Counsel for the appellant submitted that since there was no evidence that the appellant was an election agent and that since there was no evidence that P.W.3 and P.W.4 knew what the appellant meant by 'not to forget the old one', the appellant should not have been convicted on the second and the third charges.

Now, firstly, for reasons above under ground 4, so long as the necessary relevant elements under section 10(a) of the Election Offences Act 1954 are proved beyond reasonable doubt by cogent and reliable evidence against an accused person he shall, by reason of that subsection read in conjunction with section 11(1)(b) of the said Act, be guilty of corrupt practice irrespective of whether he is, at the time of committing the offence, an election agent. Though it may help to further strengthen the prosecution case or give a better understanding of the case to find out who the election agent of Anthony Teo was, in the instant case failure to do so does not, by itself, affect the outcome of the case for the offence may be committed by anyone; it is not necessary that the offender must be an election or polling agent.

As to ground 5, it must be noted that section 10(a) of the Election Offences Act upon which the prosecution relies makes it an offence of bribery if anyone, *inter alia*, gives money to any voter in order to induce the voter to vote. What is material therefore is the intention of the giver of the money, not that of the elector who was given the money. In the *Westmininster Case*(2) where the petitioner's case was that money was paid for allowing boards with the intention of corruptly influencing votes, B. Martin said (page 95):–

"The question is not what is the motive that operated upon the mind of the voter. The mind of the voter has nothing to do with it; the question is, the intention of the person who furnished the board. Probably there is no man who ever was bribed but would swear that the bribe had not influenced his vote."

I hold that these grounds fail.

Ground 6 reads:–

"That there is no evidence to support the findings of the learned Magistrate that "the accused's sole intention was to inducing P.W.2, P.W.3 and P.W.4 to vote for a certain political party" (Judgment page 10, 1st paragraph)."

Strictly speaking, it is unnecessary to prove inducement to vote for a certain political party. It is sufficient if it is proved that money was given in order to induce the elector to vote.

In determining whether there had been bribery the court will always look to the essence of the transaction whether the act was done with a view to influencing a voter in relation to his vote. The intention of a person against whom a charge of bribery is made must be proved and this may be established from his acts and other circumstances of the case. As Bucknill J. observed in *Kingston-Upon-Hull*(3)

"But people must be judged according to the inferences which people of common sense have to draw from their acts and words . . . . . you cannot allow a man to say "I do not intend to do that which amounted to bribery" if when you look at all the things which he did, and all the things which he said, there is only one conclusion to draw, which is the natural inference, and that is that he has done that which he said he did not intend to do."

On perusal of the evidence and having regard to the judgment I am of the view that the learned trial Magistrate was justified in coming to the finding as she did.

On behalf of the appellant it was submitted that the amount of money given was small and should not amount to bribery. With respect, provided the requisite corrupt intention is proved, the smallness of the amount of the bribe given is, in my view, immaterial. Section 10(a) of the Election Offences Act speaks of giving "any money". See

Blackburn Case[4] where a single bribe of 2s. 6d. was considered sufficient.

Grounds 7, 8, 9 and 10 of appeal may be conveniently taken together. They are as follows:–

"7. The learned Magistrate failed to give any or any proper and adequate consideration to the defence case."

"8. The learned Magistrate failed to appreciate that payment of money to longhouse folks as gifts and which is not intended to influence their votes would not be bribery."

"9. The learned Magistrate failed to give any or any proper and adequate consideration to the evidence of D.W.2 and failed to appreciate the established facts that the accused was the head of the muslim converts in the longhouse and the children, women and old folks always asked money from him."

"10. The verdict was unreasonable or unsatisfactory or cannot be supported having regard to the evidence."

As to ground 8, frankly, I do not see how it could be argued that the learned trial Magistrate failed to appreciate that the giving of money to longhouse folks as gifts without the intention to influence their votes would not amount to bribery as alleged. That she fully appreciated the point can be seen on page 9 of her judgment where she said:-

"Surely it is not an offence for the accused to give money out of sheer generosity, but he will be guilty of the offence of bribery if the intention of giving was to induce the witnesses to vote for a certain political party or candidate."

In the result she disbelieved the appellant that the money given to P.W.2, P.W.3 and P.W.4 was out of charity and gave reasons for so holding.

Regarding Ground 9 of appeal, again I disagree that the learned trial Magistrate failed to give any or any proper and adequate consideration to the evidence of D.W.2 as alleged. It is obvious that D.W.2's evidence was fully dealt with. I do not propose to repeat the relevant part of the judgment where this was done save saying that this may be found on pages 12, 13 and 15 of the judgment. On the contention of failure to appreciate that the appellant was the head of the Muslim converts and that the children, women and old folks always asked money from him, with respect, I am also unable to accept. These were amply dealt with in the judgment, see pages 11, 12, 13 and 14 thereof. In her carefully reasoned judgment the learned trial Magistrate disbelieved the appellant's story that he gave P.W.2, P.W.3 and P.W.4 money for the innocent purpose of drinking tea.

As to grounds 7 and 10, counsel for the appellant had not shown how the learned trial Magistrate failed to give any or any proper or adequate consideration to the defence case or how the verdict was unreasonable or unsatisfactory or cannot be supported as alleged. The appellant himself gave evidence and he called one witness. It is obvious from the judgment that the learned trial Magistrate had fully considered the defence case. (See pages 11, 12, 13, 14 and 15 of the judgment). As for the verdict, the learned trial Magistrate had carefully analysed the evidence of both sides at considerable length. She found the case against the appellant proved beyond reasonable doubt; she disbelieved the appellant's explanation and found that the explanation did not raise any doubt in the prosecution case.

In the circumstance and having fully considered the evidence on record and the submissions by counsel, I find that there is no merit in the appeal. The appeal against conviction is dismissed.

Now I come to the question of sentence. Although the Notice of Appeal stated that the appeal was also against sentence, as was rightly pointed out by the learned Deputy Public Prosecutor, no ground of appeal respecting sentence was given in the Petition of Appeal. However, since there was no serious objection, I proceeded to hear arguments. It is to be pointed out that the learned trial Magistrate was mistaken in her judgment (page 16) when she said to the effect that the offence was liable to imprisonment for 6 months and to a fine of $500.00. Section 10(a) of the Election Offences Act, so far as is relevant, enacts that a person who gives money to any elector in order to induce him to vote shall be deemed guilty of the offence of bribery. Section 11(1) of the said Act provides different punishments for different offences; for the offences of bribery under section 11(1)(b) thereof, a convicted person shall be liable to imprisonment for 12 (not 6) months and to a fine of not less than $250.00 and not exceeding $1,000.00 (not to a fine of $500.00).

It was contended on behalf of the appellant that the sentence was excessive and that the imprisonment sentence would cause the appellant the loss of his employment in a company. The words "shall be liable to" in my view give the trial court an absolute discretion, to be exercised judiciously, as to the form and the extent of the sentence to be imposed provided that the sentence imposed, be it imprisonment or fine or both, is within the maxi-

mum extent laid down by the particular law providing the punishment for the offence on which a person is convicted. *Darus* v. *Public Prosecutor*(5). The term does not make the prescribed form of punishment mandatory, and the trial court, in an appropriate case, is entitled even to act under section 294 (release on bond with suspended sentence) of the Criminal Procedure Code. See *Jayanathan* v. *Public Prosecutor*(6). In the instant case, for some reason, if any, unknown to me, the appellant made no plea of mitigation. The learned trial Magistrate after due consideration of the facts, the element of public interest and the absence of mitigation, sentenced the appellant for each offence to imprisonment for 5 days and to a fine of $100.00 or in default 2 weeks' imprisonment, the imprisonment sentence for the offences to run consecutively thus making a total of 15 days. Save for the consecutive imprisonment sentence with which I shall deal in a moment, with respect, having regard to the nature of offences, the circumstances and facts of the case and the punishment prescribed under the law, I do not see how the sentences imposed can be said to be "excessive". Indeed, it was not shown to me how they were "excessive". It is pertinent to emphasise that all forms of briberies and corruptions must not be taken lightly and this court wishes it to be made clear to the public of its strong disapproval of such type of offence.

The matters I have to consider, however, are whether –

(1) the combined sentence of imprisonment and fine imposed on each offence is appropriate;

(2) the fine of $100.00 for each offence is proper in view of there being a minimum amount prescribed under the law; and

(3) the imprisonment sentences should be consecutive.

As to the first point, section 11(1) of the Act provides sentence of imprisonment and a fine. In *R.* v. *King*(7) was held that there was nothing in principle to prevent the court from imposing a suspended imprisonment sentence and also a fine with a further term of imprisonment in default of payment of the fine. Though, strictly, *R.* v. *King supra,* is a case concerning suspended imprisonment sentence, the same principle, in my view, applies to an immediate imprisonment sentence in a proper case. Having regard to the nature of the offences and the facts and circumstances of the case, I do not think fine alone is an adequate penalty and I do not think it can be said that the learned trial Magistrate was wrong in imposing the two modes of punishment as she did. Indeed, it was not contended that she was wrong.

As to the second point, since the learned trial Magistrate considered that a fine was appropriate for each offence she should have imposed a fine of not less than $250.00 as provided in section 11(1) of the Act. In *Jayanathan* v. *Public Prosecutor (supra)* where the late Ong Hock Sim F.J. (as he then was) in dealing with section 15(4) of the Prevention of Crime Ordinance 1959 which provided that a person found guilty of an offence "shall be liable to imprisonment for a term not exceeding 5 years and not less than 2 years", said (page 69):–

> "Here, we would say we have no doubt that if a court were minded to send the offender to prison, it must, as enacted in section 15(4), impose a term of not less than 2 years."

Applying the above principle, I am constrained to increase the fine of $100.00 imposed by the learned trial Magistrate by $150.00 to $250.00 under each offence.

Before dealing with the third point, I wish to say that since there is no appeal respecting the length of the imprisonment sentences, I shall not deal with it. As to the third point, it is, I think, a generally accepted working principle that where several offences committed in the same transaction are tried together the sentences imposed for those offences should be made concurrent *R.* v. *Saleem*(8) *R.* v. *Walsh*(9) *R.* v. *Hockey*(10). Though there has been no precise definition on the term "the same transaction" for the purpose of deciding when consecutive sentences are appropriate, it is evident that in the instant case the offences arose out of the same transaction. In the circumstances the imprisonment sentences should have been made concurrent.

In the result, the appeal against convictions is dismissed. The sentences are varied as follows: the imprisonment sentences are hereby made concurrent and the fine under each offence is increased from $100.00 to $250.00. In default of payment of the sum $150.00 being the increased amount under each offence, the appellant is to be imprisoned for 2 weeks.

I would add that in view of the provisions of section 11(2) of the Election Offences Act providing (subject to qualification) incapability of being registered or listed as an elector or of voting in the event of a person being convicted of corrupt prac-

tice, the convictions in this case should be brought to the notice of the relevant authorities.

Appeal dismissed.

Solicitors: *Teo & Co.*

KUCHING MUNICIPAL COUNCIL v. CHONG NYUK LAN

[A. Cr. J. (Tan Chiaw Thong J.) September 21, 1981]
[Kuching – Criminal Appeal No. KG 6 of 1980]

Criminal Law & Procedure – Nuisance Order – Refusal of lower court to hold enquiry – Kuching Municipal Ordinance, s. 104(12).

This was an appeal by the appellants against the refusal of the lower court to hold an enquiry under section 104(12) of the Kuching Municipal Ordinance pursuant to an undated Nuisance Order by another magistrate of the same court.

The appellants had in fact applied by way of a letter written by the advocates for the appellants to the magistrate of the District Court, Kuching, attaching thereto a copy of an Order issued by the Secretary of Kuching Municipal Council requiring the respondent to abate nuisance as set out in the order. The respondent failed to comply with the order whereupon an application was made to the lower court for the issue of a Nuisance Order under section 104(4). This Nuisance Order was duly issued by the then Magistrate of the District Council but it was undated.

The lower court appeared to have taken the view that before a Nuisance Order was issued against the respondent, an application should have been made by the appellants by way of a complaint supported by affidavits, whereupon the lower court may issue a notice to the respondent to show cause against the issue of the Nuisance Order applied for.

Held: (1) in the court's opinion, because of the separate stipulations relating to public nuisances contained in the Criminal Procedure Code and the procedural provisions governing such nuisances therein, they cannot be made to apply to nuisances specified in section 104(1) of the Kuching Municipal Ordinance;

(2) in proceedings brought under section 104(12) of the Kuching Municipal Ordinance, a charge should be framed against person proceeded against thereunder charging him with the offence prescribed therein and if he satisfies the court that he had used all due diligence to carry out the requirements of the Nuisance Order he should be acquitted of the offence charged; otherwise he should be found guilty of the offence of having failed to comply with the provisions of the relevant nuisance order with respect to the abatement of the nuisance concerned;

(3) in this case, a criminal summons referring to a charge, was issued and served upon the respondent, but no copy of such charge could be found in the record of proceedings of the lower court. Solely on this ground, the appeal was misconceived and the proceedings before the lower court were also legally wrong;

(4) by making an application under section 104(4) of the Kuching Municipal Ordinance the applicant was in effect applying to the court for the exercise of a discretionary power to make a summary order. Such an application should be given a certain decree of formality and application by letter hardly fulfilled this criteria.

Case referred to:-
(1) *Dowson* v. *McGrath* (1956) 58 W.A.L.R. 27

CRIMINAL APPEAL.

K. C. I. Reddy for the appellants.
Lo Ming for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Appellants against what purports to be a refusal of the lower court to hold an inquiry under section 104(12) of the Kuching Municipal Ordinance pursuant to an undated Nuisance order by another Magistrate of the same court.

The brief facts are as follows. On May 14, 1980, the Appellants made an application to the District Court, Kuching under section 104(4) of the Kuching Municipal Ordinance for the issue of a Nuisance Order against the Respondent. The application was by the way of a letter written by the Advocates for the Appellants to the Magistrate of the District Court, Kuching, attaching thereto a copy of an Order issued by the Secretary of Kuching Municipal Council under the proviso to section 104(3) of the Kuching Municipal Ordinance, requiring the Respondent as registered proprietress of the shop house described as Lot 63, section 23 and known as No. 13 Market Street, Kuching to abate the nuisance as set out in the said Order. The Respondent failed to comply with the requirement in the said Order within a period of two weeks as specified in the Order whereupon the application as earlier mentioned was made to the lower court for the issuance of a Nuisance Order under section 104(4). This Nuisance Order was duly issued by the then Magistrate of the District Court but it was undated. It ordered the Respondent to comply with the requirements of the Order made by the Municipal Secretary within a period of ten days. The validity of the Nuisance Order was not made an issue in the lower court or in this Appeal, although it was undated. From the record of proceedings in the lower court it would appear that on June 26, 1980 a criminal summons was issued against the Respondent summoning her to appear at the District Court on July 8, 1980 "to answer the charge of (See the attached charge sheet)". No copy of the charge referred to appears in the record of proceedings of the lower court and I have not been able to obtain any elucidation on this matter from learned counsel from both parties. The lower court's record further shows that this criminal